

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

American Family Mutual Insurance Company, S.I.

(b) County of Residence of First Listed Plaintiff Dane County, WI
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Ann Marie Piana, Esq., P.O. Box 77055, Madison, WI
53707 (314) 5420-0015, ext. 54663

DEFENDANTS

Berg O'Fallon, LLC; GTB Management, LLC; Greg Berg;
and Christv CoxCounty of Residence of First Listed Defendant St. Charles County, MO
(IN U.S. PLAINTIFF CASES ONLY)NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF
THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff ☐ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|---------------------------------------|---|---------------------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input checked="" type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input checked="" type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input checked="" type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 INTELLECTUAL PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <input type="checkbox"/> 880 Defend Trade Secrets Act of 2016 SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit (15 USC 1681 or 1692) <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District (specify) ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C. Sections 1332, 1441, 1445Brief description of cause:
Declaratory Judgment Action - Insurance Policy Coverage

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

Declaratory Judgment

CHECK YES only if demanded in complaint:

JURY DEMAND:

☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

June 20, 2022

SIGNATURE OF ATTORNEY OF RECORD

/s/ Ann Marie Piana

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI**

AMERICAN FAMILY
MUTUAL INSURANCE
COMPANY, S.I.,

Plaintiff

v.

BERG O’FALLON, LLC

Serve:

Gregory T. Berg
1325 Queens Court, Ste. A
Saint Peters, MO 63376

GTB MANAGEMENT,
LLC,

Serve:

Gregory T. Berg
1325 Queens Court, Ste. A
Saint Peters, MO 63376

GREG BERG,

Serve:

Greg Berg
1325 Queens Court, Ste. A
Saint Peters, MO 63376

CHRISTY COX,

Serve:

Christy Cox
412 Camp Charren Road
Troy, Missouri 63379

Defendants.

Cause No. 4:22-cv-00659

Division No.

COMPLAINT FOR DECLARATORY JUDGMENT – INSURANCE POLICY

COMES NOW Plaintiff American Family Mutual Insurance Company, S.I. (hereinafter “American Family”), and for its cause of action against Defendants Berg O’Fallon, LLC, GTB Management, LLC, Greg Berg, and Christy Cox (hereinafter “Defendants”) states as follows:

1. Plaintiff American Family is an insurance company incorporated under the laws of the State of Wisconsin, presently in good standing in the State of Missouri, and is lawfully engaged in the insurance business in the State of Missouri.

2. Plaintiff American Family's principal place of business is located at 6000 American Parkway, Madison, Wisconsin 53783.

3. At all times relevant, Defendant Berg-O'Fallon, LLC is a Missouri Limited Liability Company in good standing.

4. At all times relevant, Defendant GTB Management, LLC is a Missouri Limited Liability Company in good standing organized for the purposes of governance, maintenance, management, administration and operation of property management.

5. At all times relevant, Defendant Greg Berg is an employee of Berg-O'Fallon, LLC and/or Defendant GTB Management, LLC.

6. At all times relevant, Defendant Christy Cox is an individual residing in Troy, Lincoln County, State of Missouri.

7. The amount in controversy exceeds the sum or value of \$75,000, exclusive of interests and costs.

8. There is a current case and controversy pending between the parties to this action. This Complaint for Declaratory Judgment is initiated to obtain a declaration of American Family's legal obligations to Defendants under insurance policy issued by American Family to Defendant Berg O'Fallon, LLC.

9. Venue is proper in the United States District Court for the Eastern District of Missouri as St. Charles County, Missouri is where the accident referred to in the Underlying Petition occurred.

10. Under a Business Key Policy of insurance issued to Berg-O’Fallon, LLC, Policy No. 24XN2567010015 (the “Policy”), American Family insured Berg-O’Fallon, LLC, Commercial General Liability Coverage, subject to the terms, conditions, and endorsements as contained within the Policy, which Policy was terminated at the request of policyholder Berg-O’Fallon, LLC on July 12, 2016. A copy of the Policy is attached as Exhibit 1 and incorporated by reference.

11. Defendants are also named parties in litigation known as *Christy Cox, Plaintiff v. GTB Management, LLC, Greg Berg, Berg-O’Fallon, LLC, MLP Management, LLC, Andrew Checkley, McHugh Company, and Dennis McHugh*, Cause No. 2011-CC00597, filed in the Circuit Court of St. Charles County, Missouri. A copy of the First Amended Petition for Damages is attached hereto, as Exhibit 2, and incorporated herein by reference and is hereinafter known as the “Underlying Litigation.”

12. In the Underlying Litigation, the Plaintiff Christy Cox claims the remaining Defendants named herein are subject to property and personal injury liability and damages arising out of the presence of “mold/fungi” (para. 16) and “mold, microbial agents, and harmful bacteria” on the Premises (para. 19). *See* Exhibit 2, paras. 16, 19.

13. In the Underlying Litigation, the Plaintiff Christy Cox alleges she was involved in a lease agreement in July 2016 through 2018 of premises located at the Triad West Shopping Center, 121 Triad West Drive, O’Fallon, MO 63366 (“Premises”). *See* Exhibit 2, para. 10.

14. In the Underlying Litigation, the Plaintiff Christy Cox alleges she discovered mold on the Premises on or about July 11, 2018. *See* Exhibit 2, para. 12.

15. American Family’s Policy terminated on July 12, 2016, at the request of its policyholder Berg-O’Fallon, LLC.

16. Defendants Berg-O’Fallon, LLC, GTB Management, LLC, and Greg Berg are being provided a defense to the Underlying Litigation filed by Plaintiff Christy Cox under a Reservation of Rights.

17. In the Underlying Litigation, Plaintiff Christy Cox’s allegations consist of a ten count First Amended Petition for Damages alleging against all named Defendants the following: Negligence (Count I), Breach of an Express Warranty (Count II), Violation of the Missouri Merchandising Practices Act (Count III), Nuisance (Count IV), Res Ipsa Loquitur (Count V), Premises Liability – Exposure to Dangerous Conditions-Toxic Mold and Excessive Dust and Other Air Born Contaminants and Noxious Gaseous (Count VI), and Negligence-Breach of Duty to Prevent Water Leakage (Count VII). Plaintiff Christy Cox’s allegations in Counts I, II, IV, V, VI, VII allege actual and punitive damages. Plaintiff Christy Cox also alleges Fraudulent Misrepresentation (Count IX) and Fraudulent Concealment (Count X) against Berg-O’Fallon, LLC, GTB Management, LLC, Berg, and MLP Management, LLC. *See* Exhibit 2. The allegations all allege injury or property damage as a result of mold exposure.

18. The Policy does not provide liability coverage for, among other reasons, the Policy contains an Endorsement adding a Fungi or Bacteria Exclusion; the subject matter of the Underlying Litigation is covered under the Policy Exclusions; the allegations in Underlying Litigation also allege intentional acts, which the Policy excludes from coverage; there are no acts alleged which would meet the definition of “bodily injury” in the Policy or the definition of an “occurrence” in the Policy; and the allegations allege damage to the property while Defendants owned it, which the Policy excludes. Further, the Policy ended at the Insured’s request in July 2016 and the first notice of mold was 2018, well after the Policy terminated.

19. The Policy states, in relevant part:

SECTION I – COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies.

* * *

b. This insurance applies to “bodily injury” and “property damage” only if:

(1) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”;

(2) The “bodily injury” or “property damage” occurs during the policy period.

* * *;

2. Exclusions

This insurance does not apply to:

a. Expected or Intended Injury

“Bodily injury” or “property damage” expected or intended from the standpoint of the insured.

b. Contractual Liability

“Bodily injury” or “property damage” for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement;

COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally liable to pay as damages because of “personal and advertising injury” to which this insurance applies.

* * *

b. This insurance applies to “personal and advertising injury” caused by an offense arising out of your business but only if the offense was committed in the “coverage territory” during the policy period.

2. Exclusions

This insurance does not apply to:

* * *

f. Breach of Contract

“Personal and advertising injury” arising out of a breach of contract, except an implied contract to use another’s advertising idea in your advertising.

SECTION V – DEFINITIONS

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

14. “Personal and advertising injury” means injury, including consequential “bodily injury” arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment
- b. Malicious prosecution
- c. The wrongful eviction from, wrongful entry into or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies committed by or on behalf of its owner, landlord or lessor

17. “Property damage” means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it: or
- b. Loss of use of tangible property that is not physical injured. All that loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

20. The “FUNGI OR BACTERIA EXCLUSION” Policy Endorsement CG 21 67 12 04 reads, in relevant part:

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.
FUNGI OR BACTERIA EXCLUSION**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. The following exclusion is added to Paragraph **2. Exclusions of Section I-Coverage A-Bodily Injury or Property Damage Liability:**

2. Exclusions

This insurance does not apply to:

Fungi or Bacteria

(1) "Bodily injury", "property damage" which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.

(2) Any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, "fungi" or bacteria, by any insured or by any other person or entity.

This exclusion does not apply to any "fungi" or bacteria that are, are on, or are contained in, a good or product intended for bodily consumption.

B. The following exclusion is added to Paragraph 2. Exclusions of Section I-Coverage B- Personal and Advertising Injury Liability:

2. Exclusions

This insurance does not apply to:

Fungi or Bacteria

(1) "Personal and advertising Injury" which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury.

(2) Any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, "fungi" or bacteria, by any insured or by any other person or entity.

C. The following definition is added to the Definitions Section:

1. "Fungi" means any type or form of fungus, including mold or mildew and any mycotoxins, spores, scents or by-products produced or released by fungi.

21. The Policy Endorsement IL 75 02 06 99 states the insurance afforded by the Policy does not apply to any claim or judgment for punitive or exemplary damages. *See Exhibit 1.*

22. This Court is empowered to declare the rights and obligations of Plaintiff American Family under the Commercial General Liability Coverage Part of the Business Key Policy.

23. Plaintiff American Family is entitled to judgment declaring that no coverage exists for any liability of Defendants Berg-O'Fallon, LLC, GTB Management, LLC and Greg Berg arising out of and asserted in the Underlying Litigation; that no coverage exists under the Policy for any claims arising out of the Underlying Litigation; that Plaintiff American Family is not liable to Defendants under the Business Key Policy pursuant to the terms, conditions and exclusions the Commercial General Liability Coverage Part; that Plaintiff American Family has

no obligation to defend Defendants Berg-O'Fallon, LLC, GTB Management, LLC and Greg Berg in the Underlying Litigation or in any other action arising out of the claims referenced in the Underlying Litigation, and that Plaintiff American Family has no duty to investigate, pay costs, or pay expenses of said Defendants in any litigation or claim arising out of the circumstances set forth in the Underlying Litigation.

WHEREFORE, Plaintiff American Family Mutual Insurance Company, S.I., respectfully prays this Honorable Court issue an Order declaring that (1) no coverage exists under the Business Key Policy for any liability of Defendants Berg-O'Fallon, LLC, GTB Management, LLC and Greg Berg which may be found against said Defendants in any present or future claim or litigation arising out of the incidents more particularly described in the Underlying Litigation; (2) Plaintiff American Family is not liable to Defendants under the aforementioned insurance Policy; (3) Plaintiff American Family is not liable under the Policy to defend, investigate, pay costs, or pay expenses of Defendants Berg-O'Fallon, LLC, GTB Management, LLC and Greg Berg in any present or future claim or litigation filed by the Underlying Plaintiff and Defendant herein Christy Cox; and (4) Plaintiff American Family further prays for a declaration that there is no coverage for the claims made in the Underlying Litigation, and any such further orders this Honorable Court deems just and proper under the circumstances.



Ann Marie Piana, #35073
P.O. Box 77055
Madison, WI 53707
(314) 542-0015 ext. 54663
Fax (866) 292-8815
apiana@amfam.com
Attorney for American Family Mutual
Insurance Company, S.I.